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No. 95-307

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN C. DORMAN AND WILMA L. DORMAN,
Petitioners,

versus

PAULINE JONES AND ANN ELL WESTBROOK, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE TENTH CIRCUIT

BRIEF OF THE RESPONDENTS, PAULINE JONES AND ANN ELL WESTBROOK, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

The only question that would properly come before this Court if *certiorari* were granted is whether the Tenth Circuit erred in affirming a District Court order dismissing a bankruptcy appeal as moot.

Contrary to the petitioners' statement, 28 U.S.C. § 2403(a) is not applicable. *See* the petition, page 16, and the certificate of service filed in connection with it; *see also* Supreme Court Rule 29.(b). None of the questions presented in the petition indicate that the petitioners seek to mount a constitutional challenge on an Act of Congress.

PARTIES TO PROCEEDING BELOW

Although they have erroneously presented questions as if everyone involved in their bankruptcy case is a party to this proceeding, John C. Dorman and Wilma L. Dorman (collectively, the "Dormans") only named Pauline Jones ("Jones"), Ann Ell Westbrook ("Westbrook"), and "John Doe(s) 1-50" as respondents in the style of their Petition for a Writ of *Certiorari*. The certificate of service the Dormans filed with respect to their petition shows that only Jones, Westbrook, and the Solicitor General were served. Presumably, this indicates that the Dormans consider Jones and Westbrook to be the only respondents before this Court. *See* Supreme Court Rules 29.3.

However, a few of the other participants in the Dormans' bankruptcy case may be parties to this proceeding, too, although they are probably unaware of it because they were not served by the Dormans. *See* Supreme Court Rules 12.4. In the notice of appeal they filed to appeal the Bankruptcy Court to the District Court, the Dormans named the following as parties:

> themselves;
>
> Jones and Westbrook;
>
> Jack Cornelius, who was the Chapter 11 trustee appointed in the Dormans' bankruptcy case;
>
> The First National Bank of Hooker, Oklahoma, which was a creditor in the Dormans' bankruptcy case; and
>
> The Office of the United States Trustee.

The document the Dormans filed to appeal the District Court's order to the Tenth Circuit did not identify who the Dormans considered to be the parties. However, the Dormans' Tenth Circuit brief listed only Jones and Westbrook as appellees, although the certificate of service states that the Dormans served their brief on the above named participants, some of the attorneys who had appeared in the Dormans' bankruptcy case, two Bankruptcy Judges (Paul B. Lindsey and Stephen Covey), the Attorney General of the State of Oklahoma, the Attorney General of the United States, and the United States Attorney in the Western District of Oklahoma.

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JURISDICTION

The Dormans have petitioned for *certiorari* review of a March 31, 1995 order entered by the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's March 31, 1995 order was entered in an appeal through which the Dormans ultimately sought reversal of a Bankruptcy Court order.

The Dormans requested rehearing of the March 31, 1995 order, which the Tenth Circuit denied on May 2, 1995. On May 4, 1995, the Tenth Circuit reissued its May 2, 1995 order, *nunc pro tunc,* to correctly identify the members of the panel that denied the Dormans' request for rehearing.

The Dormans unsuccessfully tried on or about July 31, 1995 to file a petition for a writ of *certiorari.* The Dormans did not succeed in filing their corrected petition until August 23, 1995.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1). Contrary to the Dormans' jurisdictional statement, neither Wilma L. Dorman's alleged status as an American Indian nor 28 U.S.C. § 1651 serves as a basis for this Court to exercise jurisdiction. The quote the Dormans offer as support for the proposition that this Court has jurisdiction over matters involving Indians, which is erroneously identified as a quote from Article III of the United States Constitution, is actually a quote from Article III of the Northwest Ordinance of 1787 and obviously has no relevance here. It is also well established that 28 U.S.C. § 1651 does not expand federal court jurisdiction. *Telecommunications Research and Action Center v. F.C.C.,* 750 F.2d 70, 76 (D.C. Cir. 1984), *quoting* 9 J. Moore, *Moore's Federal Practice,* § 110.26 at page 282 (2d ed. 1983).

The Tenth Circuit's appellate jurisdiction over the appeal from the District Court was based on 28 U.S.C. § 158(d). The District Court's appellate jurisdiction

over the appeal from the Bankruptcy Court was based on 28 U.S.C. § 158(a). The Bankruptcy Court's jurisdiction was based on 28 U.S.C. § 1334(a) and (b) and § 157(a) and (b)(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED IN THE CASE

A. *CONSTITUTIONAL PROVISIONS*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

B. *STATUTES*

"The trustee in a case under this title is the representative of the estate."

11 U.S.C. § 323(a).

> In a case under chapter 7 of this title, if the trustee does not assume or reject an execu-

tory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

11 U.S.C. § 365(d)(1).

In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2).

Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4).

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a).

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(a).

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b)(1).

The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a).

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

28 U.S.C. § 1254(1).

Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 U.S.C. § 1334(a).

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b).

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and

> shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(a).

C. *ORDINANCES*

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance of 1787, Article III.

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BRIEF OF THE RESPONDENTS, PAULINE JONES AND ANN ELL WESTBROOK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME NOW the respondents, Jones and Westbrook, and submit their brief in opposition to the Dormans' Petition for a Writ of *Certiorari*.[1]

STATEMENT OF THE CASE

A. *NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW*

The only order arguably subject to review by *certiorari* is a Tenth Circuit order affirming an order

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[1] Although denominated as a petition for a writ of *certiorari*, the Dormans refer in their petition to the All Writs Act, 28 U.S.C. § 1651. *See* the Dormans' Petition, page 20. Given that the Dormans are appearing *pro se*, this reference may simply be an error. However, if it is not, Jones and Westbrook submit that the Dormans are not entitled to relief through an extraordinary writ. The Dormans have not satisfied any of the substantive or procedural requirements in connection with obtaining such a writ. 28 U.S.C. § 1651(a); Supreme Court Rule 20.

entered by the United States District Court for the Western District of Oklahoma. The District Court order dismissed as moot the Dormans' appeal from an order entered by the United States Bankruptcy Court for the Western District of Oklahoma.

B. *MATERIAL FACTS*

The Dormans recount what they think happened in their bankruptcy case and offer explanations for why they think it happened. In the process, the Dormans complain about practically everything and blame almost everyone, including their former attorneys, the Chapter 11 trustee appointed in the their bankruptcy case, four Bankruptcy Judges, a District Court Judge, unnamed members of the Bankruptcy Court Clerk's staff, and virtually every lawyer and creditor that actively participated in the *Dorman* bankruptcy case, each of whom allegedly engaged in all sorts of misconduct.

The Dormans' account of the "facts" is almost totally inaccurate, unsubstantiated by the record, and irrelevant to any question that might properly come before this Court if *certiorari* were granted. The accurate, substantiated, and potentially relevant facts are as set forth below.[2]

Several years ago, Jones and Westbrook leased certain nonresidential real property to the Dormans (the "Leased Property"). Dormans' Petition, page 21. A short time later, both of the Dormans filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* Tenth Cir. App., Tab 1, Ex.

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[2] Unless otherwise indicated, record references are to Jones' and Westbrook's Supplemental Appendix in the Tenth Circuit (hereinafter "Tenth Cir. App., Tab ___, Ex. ___, page ___"). Given that the Dormans are attempting to raise new issues in their petition, certain facts not in the record below may be germane. Those facts are documented in the appendix to this brief (hereinafter "Sup. Ct. App., page ___").

G, page 2, docket entry 1. Under penalty of perjury, the Dormans listed the Leased Property in their bankruptcy schedules as property in which they had an interest. Sup. Ct. App., pages 1-4, which were excerpted from the Dormans' bankruptcy schedules.

More than sixty days after they filed bankruptcy, the Dormans moved pursuant to 11 U.S.C. § 365(d)(4) to extend the time within which they could seek to assume or reject unexpired leases, such as those through which they claimed their interests in the Leased Property (the "Motion to Extend"). Tenth Cir. App., Tab 1, Ex. B, pages 1-2. The Motion to Extend was admittedly not filed timely under 11 U.S.C. § 365(d)(4). *See, e.g.*, the Dormans' Petition, page 31 ("[T]he attorney for the debtors had allowed the time limit for rejecting or assuming the [leases covering the Leased Property] to lapse . . . .")

A few days before the extension requested in the Motion to Extend was to expire, the Bankruptcy Court approved the appointment of a trustee in the Dormans' bankruptcy case (the "Trustee"). Tenth Cir. App., Tab 1, Ex. A, page 1. Upon his appointment, the Trustee replaced the Dormans as the representative of the Dormans' bankruptcy estate. 11 U.S.C. § 323(a).

After the Trustee was appointed, the Dormans' counsel filed a second motion seeking an extension of time within which to assume or reject unexpired leases (the "Second Request"). *See* Tenth Cir. App., Tab 1, Ex. A, page 1, and Ex. G, page 9, docket entry 80. The Bankruptcy Court never granted the Second Request, which would have expired years ago even if it had been granted. Tenth Cir. App., Tab 1, Ex G, pages 1 *et seq.*

The Trustee did not join in the Second Request or independently seek an extension of time to assume or reject unexpired leases. *id.* No one sought an extension of time beyond the extension sought in the Second Request. *id.*

After filing the Second Request, the Dormans' counsel discovered that the Bankruptcy Court had not granted the Motion to Extend. The Dormans' counsel then submitted to the Bankruptcy Court what was represented to be an unopposed order granting the Motion to Extend. Sup. Ct. App., page 5. Based on the representation that it was unopposed, the Bankruptcy Court entered an order granting the Motion to Extend (the "Extension Order"). *id.*

The only reason Jones and Westbrook had not opposed the untimely Motion to Extend was because it had never been served on them or their counsel. As soon as Jones' and Westbrook's counsel discovered that the Dormans' counsel had filed the Motion to Extend and that the Bankruptcy Court had entered the Extension Order, Jones' and Westbrook's counsel immediately filed a motion to vacate the Extension Order and requested an order directing the Trustee to immediately surrender the Leased Property (the "Motion to Vacate"). Sup. Ct. App., pages 6-10. The Motion to Vacate was based on the fact that the Motion to Extend was not timely under 11 U.S.C. § 365(d)(4) and that the leases through which the Dormans claimed their interest in the Leased Property had therefore been deemed rejected. *id.*

The Motion to Vacate was set for hearing by *ex parte* application and order. Sup. Ct. App., pages 11-13. The *ex parte* order also shortened the time within which parties were to respond to the Motion to Vacate. Sup. Ct. App., pages 14-15. No other *ex parte* relief was sought or granted to Jones and Westbrook and the Dormans' counsel never complained about the *ex parte* order setting the hearing and shortening the response time. *See generally,* Tenth Cir. App., Tab 1, Ex. G, pages 1 *et seq.*

The Bankruptcy Court heard the Motion to Vacate in open court approximately a week after it was filed. The Dormans' counsel, the Trustee, and the Trustee's

counsel were all present and actively participated in that hearing. After hearing the arguments of counsel and the uncontested facts, the Bankruptcy Court entered an order that vacated the Extension Order and directed the Trustee to immediately surrender the Leased Property to Jones and Westbrook (the "Surrender Order"). Sup. Ct. App., pages 16-17.

The Dormans appealed the Surrender Order to the District Court and sought a stay pending appeal. The District Court denied the Dormans' request for a stay. The Dormans' Petition, pages 62-65. The Dormans appealed the District Court's denial of a stay, but the appeal was dismissed on jurisdictional grounds. *See* Tenth Cir. App., Tab 2, pages 1-2, in which the District Court recounts this history.

Very shortly after the Bankruptcy Court entered the Surrender Order, Jones and Westbrook re-let the Leased Property to several third parties, none of whom were parties to the Dormans' bankruptcy case. Tenth Cir. App., Tab 1, Ex's. C and D. These third parties were never made parties to the Dormans' appeal. *See* Tenth Cir. App., Tab 3, pages 1 *et seq.*

At or about the same time Jones and Westbrook re-let the Leased Property, they and the Trustee, as representative of the Dormans' bankruptcy estate, entered into a settlement that resolved the issues ultimately underlying the Dormans' appeal of the Surrender Order. Tenth Cir. App., Tab 1, Ex. E, pages 1 et seq. This settlement was approved in a Bankruptcy Court order entered on a motion the Trustee's counsel certified had been served on everyone listed on the mailing matrix in the Dormans' bankruptcy case, which would have included the Dormans. Tenth Cir. App., Tab 1, Ex. F, pages 1-3; *see also* Sup. Ct. App., pages 18-29 and 30-31. The Dormans did not oppose Jones' and Westbrook's settlement with the Trustee or appeal the Bankruptcy Court order approving it.

Because the Leased Property had been re-let to third parties who were not before the District Court and because all issues ultimately underlying the Dormans' appeal of the Surrender Order had been resolved in the Bankruptcy Court approved settlement, Jones and Westbrook filed a motion in the District Court to dismiss the Dormans' appeal as moot. Tenth Cir. App., Tab 1. The Dormans did not respond to Jones' and Westbrook's motion to dismiss, although it was served on them. *id.*; *see also* Tenth Cir. App., Tab 3. Nonetheless, Jones' and Westbrook's motion to dismiss was not granted by default. Tenth Cir. App., Tab 2, pages 1 *et seq.* The District Court considered the arguments and evidence presented to it and concluded that the Dormans' appeal had become moot. *id.* Accordingly, the District Court granted Jones' and Westbrook's motion to dismiss.[3]

The Dormans appealed the District Court dismissal of their appeal to the Tenth Circuit, which affirmed. The Dormans then sought rehearing, which the Tenth Circuit denied. The Dormans' Petition for a Writ of *Certiorari* followed.

SUMMARY OF THE ARGUMENT

In their words, the Dormans "are requesting the Supreme Court to review [their] bankruptcy case . . ." and "restore their property — their family farm." The Dormans' Petition, pages 8 and 29, respectively. Succinctly, the Dormans are seeking wholesale review of and relief from virtually every order entered in their bankruptcy case. To that end, the Dormans present dozens of questions touching on seemingly every facet

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[3] The Dormans have appended copies of various orders to their petition that are not exact reproductions. The orders appended by the Dormans include a number of transcription errors not present in the original orders and include emphasis added by the Dormans. The transcription errors and added emphasis do not appear to substantively change the orders.

of their bankruptcy case. However, practically none of those questions would properly come before this Court if *certiorari* were granted. The only question that would properly come before this Court is whether the Tenth Circuit erred in affirming the District Court order dismissing the Dormans' appeal from the Surrender Order as moot. The Tenth Circuit did not err. As a result, the Dormans' petition should be denied.

ARGUMENT

A. *THIS CASE WAS CORRECTLY DECIDED BELOW.*

The Tenth Circuit was correct in affirming the District Court order dismissing the Dormans' appeal from the Surrender Order as moot. The mootness doctrine is grounded in the "case or controversy" limitation, which insures that federal courts exercise their power only in a true adversary context. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). When events occur that prevent a federal court from granting a litigant effective relief, the case has become moot and should be dismissed. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). That is precisely what happened here.

1. *The Bankruptcy Court approved settlement mooted the Dormans' appeal of the Surrender Order.*

Jones and Westbrook entered into a Bankruptcy Court approved settlement agreement with the representative of the Dormans' bankruptcy estate, *i.e.*, the Trustee, that mooted the Dormans' appeal of the Surrender Order. That settlement resolved all claims the Dormans may have had to the Leased Property. The Dormans' failure to oppose and appeal that Bankruptcy Court order made it impossible for the District Court to grant the Dormans effective relief. Regardless what the District Court might have otherwise done with respect to the Surrender Order, the Bankruptcy Court approved settlement between Jones, Westbrook,

and the Trustee precluded the Dormans from ever achieving their objective, *i.e.*, regaining the Leased Property. This rendered the Dormans' appeal moot. As a result, the District Court's dismissal of the Dormans' appeal was proper and the Tenth Circuit's affirmance of the dismissal was correct. *Burke v. Barnes*, 479 U.S. 361, 363, 107 S. Ct. 734, 736, 93 L.Ed.2d 732 (1987) (Article III requires a live case or controversy at the time a federal court decides a case.)

The only direct argument the Dormans seem to offer to avoid the effect of the Bankruptcy Court approved settlement is an alleged lack of notice of the settlement. However, the facts do not support the Dormans' allegation. The certificate of service on the motion requesting approval of the settlement between Jones, Westbrook, and the Trustee shows that the motion was served on everyone listed on the mailing matrix in the Dormans' bankruptcy case. The Dormans were listed on that mailing matrix. Moreover, the Dormans never raised this lack of notice issue below. As a result the Dormans' lack of notice argument should not be considered on *certiorari*. *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927).

2. *The Dormans' failure to join all parties whose rights would have been effected by the appeal of the Surrender Order rendered that appeal moot.*

Shortly after the Surrender Order was entered, the Leased Property was re-let for value to third parties. These third parties were not made parties to the Dormans' appeal of the Surrender Order. This made it impossible for the District Court to grant the Dormans effective relief and, thus, rendered the Dormans' appeal of the Surrender Order moot. *Valley National Bank of Arizona v. Trustee of Westgate-California Court, Inc.*, 609 F.2d 1274, 1283 (9th Cir. 1979);

Matter of Combined Metals Reduction Co., 557 F.2d 179, 194 (9th Cir. 1977). Consequently, both the District Court's dismissal of the Dormans' appeal as moot and the Tenth Circuit's affirmance of that dismissal were proper.

3. *Expiration of all requested extensions mooted the Dormans' appeal of the Surrender Order.*

All requested extensions of time to assume or reject the leases through which the Dormans claimed their interest in the Leased Property expired long before the District Court dismissed the Dormans' appeal on mootness grounds. When the last of those requested extensions expired, the propriety of the Bankruptcy Court's ruling in the Surrender Order became nothing more than a hypothetical inquiry. As soon as the last of the extensions expired, the leases through which the Dormans claimed their interest in the Leased Property were deemed under 11 U.S.C. § 365(d)(4) to have been rejected, regardless whether the Bankruptcy Court erred in the Surrender Order. Consequently, the District Court's dismissal of the Dormans' appeal was proper and the Tenth Circuit's affirmance was correct. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

B. *VIRTUALLY NONE OF THE QUESTIONS PRESENTED BY THE DORMANS WOULD PROPERLY COME BEFORE THIS COURT IF CERTIORARI WERE GRANTED.*

Virtually none of the questions presented by the Dormans would properly come before this Court if *certiorari* were granted. The Dormans listed dozens of questions in their petition that are totally unrelated to the question whether the Tenth Circuit erred in affirming the District Court order dismissing their ap-

peal of the Surrender Order as moot (the "Mootness Question"). Those unrelated questions, which range from whether venue was proper in connection with certain occurrences in the Dormans' bankruptcy case to whether the Dormans' Fourth, Sixth, and Eighth Amendment rights were infringed in their bankruptcy case, would not properly come before this Court if *certiorari* were granted.

There are a number of reasons why the questions unrelated to the Mootness Question would not properly come before this Court if *certiorari* were granted. First, the Dormans did not present and obtain rulings below on those unrelated questions. As a result, under traditional Supreme Court practice, the unrelated questions should not be reviewed on *certiorari*. *Duignan, supra.*

Second, the unrelated questions are clearly an improper attempt by the Dormans to collaterally attack almost every order entered during their bankruptcy case. The Dormans did not timely attack those orders directly below and may not now attack them collaterally here. *Sampsell v. Imperial Paper & Color Corporation*, 313 U.S. 215, 218-19, 61 S.Ct. 904, 907, 85 L.Ed. 1293 (1941).

Third, the unrelated questions directly involve the rights of many participants in the Dormans' bankruptcy case. However, at most, very few of those participants were named as parties to the appeal below or are parties here. This Court could not properly grant the Dormans any relief on the questions that involve participants in the Dormans' bankruptcy that were not parties to the appeal below and are not parties here. Consequently, this Court should deny the Dormans' petition insofar as it seeks review of those questions. *Terry v. Abraham*, 93 U.S. 38, 3 Otto 38, 23 L.Ed. 794 (1876).

Fourth, the record would not permit this Court to review the questions the Dormans wish to present that are unrelated to the Mootness Question. Accordingly, this Court should deny the Dormans' petition insofar as it seeks review of those questions. *See Erie R. Co. v. Kirkendall,* 266 U.S. 185, 45 S.Ct. 33, 69 L.Ed. 236 (1924).

Fifth, some or all of the orders the Dormans wish to attack are moot, *e.g.*, the order confirming the plan of reorganization in the Dormans' bankruptcy case. *See, e.g.*, the Dormans' Petition, page 36 (admitting that their property has already been liquidated and all creditors have already been paid). As a result, this Court could not grant the Dormans effective relief. The Dormans' petition should therefore be denied insofar as it seeks review of moot orders. *Burke, supra.*

For each of the reasons stated above, the questions presented by the Dormans that are not related to the Mootness Question would not properly be addressed if *certiorari* were granted. The Dormans' petition should be denied insofar as it seeks review of those questions.

C. *THE SURRENDER ORDER WAS NOT ERRONEOUS.*

Although they are amongst the questions that would not properly come before this Court if *certiorari* were granted, the Dormans pose several questions addressing the correctness of the Surrender Order ultimately underlying their appeal. Those questions are based on two flawed arguments.

The first is the Dormans' argument that they somehow owned their interest in the Leased Property separate and apart from their bankruptcy estate. *See, e.g.*, the Dormans' Petition, page 21. This argument is contrary to both the law and facts. With limited exceptions not relevant here, all property in which a debtor holds a pre-bankruptcy interest will become property of the bankruptcy estate upon the commencement of a bankruptcy case. 11 U.S.C. § 541(a)(1). The Dormans

admit that they leased the Leased Property. The Dormans' Petition, page 21 ("John. C. Dorman and Wilma Dorman . . . leased certain nonresidential real property from Jones and Westbrook.") The Dormans also signed bankruptcy schedules under penalty of perjury in which they listed the Leased Property as property in which they held an interest. Thus, the Dormans' argument that they owned their interest in the Leased Property in a fashion where it did not become part of their bankruptcy estate is contrary to the law and facts.

The second argument the Dormans offer in support of their claim that the Surrender Order was erroneous is that 11 U.S.C. § 365(d)(4) "does not apply to rehabilitation cases; but to large shopping mall [sic] . . . ." The Dormans' Petition, page 25. This argument is contrary to the plain language of 11 U.S.C. § 365(d)(4), which states in relevant part:

> in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

The plain language of 11 U.S.C. § 365(d)(4) shows that it applies in every bankruptcy case in which the debtor is a lessee of nonresidential real property, regardless of the Chapter under which the bankruptcy case is filed and regardless of the type of debtor involved. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).

The facts show that the Dormans' interest in the Leased Property was property of the Dormans' bankruptcy estate. The facts also show that the Dormans did not timely seek to extend the time within which they could seek to assume or reject the leases through which they claimed their interest in the Leased Property. Under the plain language of 11 U.S.C. § 365(d)(4), those leases were therefore deemed to have been rejected. As a result, the Surrender Order was correct and, leaving aside all other considerations, should not be reviewed on *certiorari*.

CONCLUSION

Only one question would properly come before this Court if *certiorari* were granted and that question was correctly decided below. The Tenth Circuit correctly affirmed the District Court's determination that the Dormans' appeal of the Surrender Order had become moot. Events occurring while the Dormans' appeal was pending made the relief ultimately sought unavailable. As a result, affirmance of the dismissal of the Dormans' appeal was not a departure by the Tenth Circuit from the accepted and usual course of judicial proceedings, did not sanction such a departure by a lower court, and does not implicate any other special and important reason for granting review. The Dormans' Petition for a Writ of *Certiorari* should therefore be denied.

Jones and Westbrook further submit that the Dormans' petition is extraordinarily frivolous and that damages and double costs should therefore be awarded against the Dormans under Supreme Court Rules 42.2 and 43.7.

WHEREFORE, the respondents, Pauline Jones and Ann Ell Westbrook pray that the Dormans' Petition for a Writ of *Certoriari* be denied and that Jones

and Westbrook have such other and further relief as is just and proper, including an award of damages, attorney's fees, and double costs incurred in opposing the Dormans' petition.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENTS,
PAULINE JONES AND
ANN ELL WESTBROOK

*Counsel of Record

No. 95-307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN C. DORMAN AND WILMA L. DORMAN,
Petitioners,

versus

PAULINE JONES AND ANN ELL WESTBROOK, ET AL.,
Respondents.

APPENDIX TO BRIEF OF THE RESPONDENTS, PAULINE JONES AND ANN ELL WESTBROOK, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PAULINE JONES AND
ANN ELL WESTBROOK

*Counsel of Record

FORM B6 - Cont.
(6/90)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: JOHN C. DORMAN and WILMA L. DORMAN, Debtors. Case No. BK. 92-16654 LN
Filed December 1, 1992 Ch 12

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedule A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts from Schedules D, E, and F to determine the total amount of the debtor's liabilities.

Name of Schedule	Attached (Yes/No)	No. Of Sheets	Amounts Scheduled: Assets	Liabilities	Other
A. Real Property	Yes	3	$280,000.00		
B. Personal Property	Yes	6	$418,645.00		
C. Property Claimed As Exempt	Yes	3			
D. Creditors Holding Secured Claims	Yes	2		$563,335.00	
E. Creditors Holding Unsecured Priority Claims	Yes	2		$ 4,000.00	
F. Creditors Holding Unsecured Nonpriority Claims	Yes	4		$71,192.00	
G. Executory Contracts and Unexpired Leases	Yes	1			
H. Codebtors	Yes	1			
I. Current Income of Individual Debtor(s)	Yes	1			$24,210.00
J. Current Expenses of Individual Debtor(s)	Yes	1			$ 2,734.00
Total Number of Sheets In ALL Schedules		24			
			Total Assets	$698,645.00	
				Total Liabilities	$638,527.00

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FORM B6G
(10/89)

IN RE: JOHN C. DORMAN and WILMA L. DORMAN, Debtors. Case No. BK. 92-16654 LN

SCHEDULE G — EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests.

State nature of debtor's interest in contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease.

Provide the names and complete mailing addresses of all other parties to each lease or contract described.

NOTE: A party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors.

☐ Check this box if debtor has no executory contracts or unexpired leases.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT
Pauline Jones 1105 Westhaven Liberal, KS 67901 *10 Year Lease*	1164 ac. dryland Rent: 1/3 of crop 255 acres grass
Pauline Jones 1105 Westhaven Liberal, KS 67901 *10 Year Lease*	392 ac. irrigated Rent: 50% crop $1,402/annual
Mary Lou Nassaman 7009 Cottonwood Shawnee Mission, KS 66216	160 acres crops* Rent: 1/6
Carol L. Yates 433 Westfield Court Wichita, KS 67212	160 acres crops* Rent: 1/6 of crops *co-owners

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FORM B6-
Cont.
(6/90)

IN RE: JOHN C. DORMAN and WILMA L. DORMAN,
Debtors. Case No. BK. 92-16654 LN

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 25 sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date: 10/06/92 /s/ John C. Dorman
Debtor

Date: 10/06/92 /s/ Wilma Dorman
(Joint Debtor, if any)

(If joint case, both spouses must sign)

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF CORPORATION OR PARTNERSHIP

I, the _____ (the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership) of the _____ (corporation or partnership) named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ (total shown on summary page plus 1) sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date _____

Signature _____

_____

(Print or type name of individual signing on behalf of debtor)

(An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.)

Penalty for making a false statement or concealing property. Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C.A. §§ 152 and 3571.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN and	)	Case No. BK. 92-16654 LN
WILMA L. DORMAN,	)	(Chapter 11)
	)	
Debtors.	)	Filed February 8, 1993

ORDER EXTENDING TIME TO ASSUME OR REJECT EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES

Upon application by the Debtors for an extension of time to assume or reject executory contracts and/or unexpired leases, and there having been no objection filed within the time allowed to the granting of the relief requested in the Application, pursuant to Fed.R.Bankr.9006, the time for Debtors to assume or reject executory contracts is extended to February 8, 1993.

Date: February 8, 1993

/s/ Paul B. Lindsey
United States Bankruptcy Judge

Prepared By:
/s/ D. Benham Kirk
Charles R. Underwood OBA #11553
D. Benham Kirk, Jr. OBA #5044
Underwood, Bardrick & Kirk
P.O. Box 13548
Oklahoma City, OK 73113-1548

Attorneys For Debtors

Approved:
Assistant U.S. Trustee
By: /s/ Mark B. Toffoli

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN and	)	Case No. BK. 92-16654 LN
WILMA L. DORMAN,	)	(Chapter 11)
	)	
Debtors.	)	

MOTION TO VACATE ORDER EXTENDING TIME TO ASSUME OR REJECT EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES, MOTION FOR ORDER COMPELLING IMMEDIATE SURRENDER OF PROPERTY, AND BRIEF IN SUPPORT

COME NOW Pauline Jones and Ann Ell Westbrook (the "Movants") and move the Court to vacate the Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases entered on February 8, 1993 ("the Order"). The Movants further move for an order compelling the Debtors to immediately surrender the nonresidential real property described below. The Movants state as follows in support of this Motion:

1. This case was commenced as a voluntary Chapter 11 on October 8, 1992 and an order for relief was entered on that date. 11 U.S.C. § 301.

2. Prior to the commencement of this case, the Movants leased the following nonresidential real property to the Debtors:

> The South Half of the Northeast Quarter of Section 22; the Southwest Quarter of Section 15; the South Half of Section 16; the Southeast Quarter of Section 17; the South Half of Section 19; the Northwest Quarter of Section 21; the Southeast Quarter of Section 21; the North

Half of the Southwest Quarter of Section 21, all in Township 5, Range 22, Beaver County, Oklahoma

(the "Leased Property").

3. On December 8, 1992, the Debtors moved to extend the time within which to assume or reject unexpired leases (the "Motion"). Although counsel for the Movants filed an entry of appearance in this case on November 10, 1992 and had preliminary discussions with counsel for the Debtors about an agreed extension of the time within which to assume or reject unexpired leases, the Motion was not served on counsel for the Movants. Counsel for the Movants first learned in mid to late January of 1993 that the Motion had been filed when the undersigned obtained and reviewed a copy of the docket sheet.

4. Section 365(d)(4) of the Bankruptcy Code provides that:

> "if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such sixty-day period, fixes, then such lease is deemed rejected . . ."

5. The Motion was not filed or served within sixty days after the date of the order for relief. As a result, the lease between the Movants and the Debtors was rejected by operation of law and the Court did not have authority to enter the Order. See, *In re: Tompkins*, 95 B.R. 722, 724 (9th Cir. BAP 1989), applying the sixty-day period specified in 11 U.S.C. § 365(d)(1); In accord, *In re: Butcher Shop and Deli of Miami, Inc.*, 45 B.R. 239, 240 (Bankr. S.D. Fla. 1984); See also *In re: Southwest Aircraft Services, Inc.*, 831 F.2d 848, 850 (9th Cir. 1987): ". . .[T]he debtor must file its motion to show

cause [for the extension] within [the sixty-day period] . . ."; See also, *Matter of American Health-Care Management, Inc.* 900 F.2d 827, 830 (5th Cir. 1990): " . . . [A] bankruptcy court may grant . . . extensions of the time in which a lessee must assume or reject its leases of nonresidential real property so long as a motion to extend is brought prior to the expiration of the period . . ."

6. Under Local Bankruptcy Rule 12(h)(4), if an order is not submitted and filed within twenty days of the expiration of the response period, the motion will be stricken. Assuming the response time on the Motion had expired, as represented in the Order and despite the Motion never having been served on counsel for the Movants, the Order was submitted well outside the time period specified in Local Bankruptcy Rule 12(h)(4). In fact, the Order was submitted only after counsel for the Debtors was told on or about February 4, 1993 by the undersigned that the Motion was not timely and that no order thereon had ever been entered. The Order, which was never served on counsel for the Movants and only came to their attention through an offhand comment by counsel for the Trustee, was therefore submitted and entered on a motion that was either deemed to have been stricken or that should have been stricken. Consequently, the Order should be vacated.

7. With respect to nonresidential real property subject to a rejected lease, 11 U.S.C. § 365(d)(4) also provides that: " . . . the trustee shall immediately surrender such nonresidential real property to the lessor." The Movants are therefore entitled to an order compelling the Debtors to immediately surrender the Leased Property. *In re: Elm Inn, Inc.*, 942 F.2d 630, 633 (9th Cir. 1991).

WHEREFORE, Pauline Jones and Ann Ell Westbrook pray that the Order Extending Time to Assume

or Reject Executory Contracts and/or UnexpiredLeases entered on February 8, 1993 be vacated, that an Order compelling the Debtors to immediately surrender the above described premises to the Movants be entered, and that the Movants have such other and further relief as is just and proper.

Respectfully submitted,

/s/ Stephen W. Elliott
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(405) 848-4810

ATTORNEYS FOR PAULINE JONES AND ANN ELL WESTBROOK

CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of February, 1993, a true and correct copy of the foregoing Motion to Vacate Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases, Motion for Order Compelling Immediate Surrender of Property, and Brief in Support was hand delivered to the following:

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Oklahoma City, OK 73116

D. Benham Kirk
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Haswell, Jones, Hughey & Vaughan
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Karla Finnell
801 N.W. 34th St.
Oklahoma City, OK 73118

/s/ Stephen W. Elliott

518.01/P6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN and	)	Case No. BK. 92-16654 LN
WILMA L. DORMAN,	)	(Chapter 11)
	)	
Debtors.	)	

APPLICATION FOR AN ORDER SHORTENING THE RESPONSE TIME TO MOTION TO VACATE ORDER EXTENDING TIME TO ASSUME OR REJECT EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES AND MOTION FOR ORDER COMPELLING IMMEDIATE SURRENDER OF PROPERTY AND SETTING HEARING THEREON

COME NOW Pauline Jones and Ann L. Westbrook ("the Applicants") and apply for an Order Shortening the Response Time to their Motion to Vacate Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases and Motion for Order Compelling Immediate Surrender of Property (collectively the "Motions"). The Applicants state as follows in support hereof:

1. A confirmation hearing on the Debtors' plan of reorganization is set for March 26, 1993 at 9:00 a.m.

2. Prior to the commencement of this case, the Applicants leased significant acreage to the Debtors.

3. The Applicants' acreage is approximately half of the total acreage farmed by the Debtors.

4. Without the Applicants' acreage, the Debtors' plan of reorganization does not appear to be feasible.

5. As set forth in the Motions, the Applicants contend that the lease between them and the Debtors

has been rejected by operation of law. The Applicants further contend that the leased acreage is therefore no longer available to the Debtors.

6. Given the significance of the Applicants' acreage to the Debtors plan of reorganization, the Applicants respectively submit that shortening the response time on the Motions and setting the Motions for hearing at the same time as the hearing on confirmation of the Debtors' plan of reorganization is appropriate.

WHEREFORE Pauline Jones and Ann L. Westbrook pray that the court shorten the time to respond to their Motion to Vacate Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases and Motion for Order Compelling Immediate Surrender of Property to 5 days and further pray that the court sets those Motions for hearing on March 26, 1993 at 9:00 a.m.

Respectfully submitted,

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A Professional Corporation
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Suite 2100
Oklahoma City, Oklahoma 73118
(405) 848-4810

ATTORNEYS FOR PAULINE JONES AND ANN ELL WESTBROOK

CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of February, 1993, a true and correct copy of the foregoing Application For An Order Shortening The Response Time To Motion To Vacate Order Extending Time To Assume Or Reject Executory Contracts and/or Unexpired Leases and Motion for Order Compelling Immediate Surrender of Property and Setting Hearing Thereon was hand delivered to the following:

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D. Benham Kirk
Underwood, Bardrick & Poland
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Michael A. Bickford
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Oklahoma City, OK 73118

/s/ Stephen W. Elliott

518.01/P7

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN and	)	Case No. BK. 92-16654 LN
WILMA L. DORMAN,	)	(Chapter 11)
	)	
Debtors.	)	

ORDER SHORTENING RESPONSE TIME AND SETTING HEARING

Upon consideration of the Application for an Order Shortening Response Time to Motion to Vacate Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases and Motion for Order Compelling Immediate Surrender of Property filed by Pauline Jones and Ann Ell Westbrook, and for good cause shown,

IT IS ORDERED, ADJUDGED AND DECREED that the response time to the foregoing motions is hereby shortened to 5 days from the date hereof.

IT IS ORDERED, ADJUDGED AND DECREED that such motions are set for hearing before the undersigned in the sixth floor courtroom, 201 Dean A. McGee Avenue, Oklahoma City, Oklahoma 73102, on the 23rd day of February, 1993, at 9:00 a.m.

IT IS SO ORDERED.

DATED this 16th day of February, 1993.

/s/ Paul B. Lindsey
PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

APPROVED FOR ENTRY:

/s/ Stephen W. Elliott

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PRINGLE & PRINGLE
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ATTORNEYS FOR PAULINE JONES
AND ANN ELL WESTBROOK

518.01/P8

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN and	)	Case No. BK. 92-16654 LN
WILMA L. DORMAN,	)	(Chapter 11)
	)	
Debtors.	)	

ORDER GRANTING MOTION TO VACATE ORDER EXTENDING TIME TO ASSUME OR REJECT EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES AND MOTION FOR ORDER COMPELLING IMMEDIATE SURRENDER OF PROPERTY

Upon consideration of the Motion to Vacate Order Extending Time to Assume or Reject Executory Contracts and/or Unexpired Leases and Motion for Order Compelling Immediate Surrender of Property filed by Pauline Jones and Ann Ell Westbrook (the "Motions"), and after considering the arguments of counsel, the Court concludes for the reasons stated orally and recorded in open court that the Motions should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order Extending the Time to Assume or Reject Executory Contract and/or Unexpired Leases that was entered on February 8, 1993 is hereby vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the lease of non-residential real property between the debtors, Pauline Jones and Ann Ell Westbrook (the "Lease") is deemed to have been rejected.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the non-residential real property un-

der the Lease (the "Leased Acreage") shall immediately be surrendered by the trustee to Pauline Jones and Ann Ell Westbrook.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this order is entered without prejudice to the parties' rights, if any, in crops planted on the Leased Acreage after October 8, 1992.

DATED: February 24, 1993

IT IS SO ORDERED.

/s/ Paul B. Lindsey
PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

APPROVED FOR ENTRY:

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ATTORNEYS FOR PAULINE JONES
AND ANN ELL WESTBROOK

518.01/P12

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN and Wilma DORMAN,	)	Case No. BK. 92-16654 LN
	)	Chapter 11
	)	
Debtors.	)	

MOTION TO COMPROMISE CONTROVERSY AND NOTICE TO CREDITORS OF PROPOSED COMPROMISE

Jack Cornelius, Trustee herein, respectfully represents

1. That movant is the duly appointed, qualified, and acting trustee in the above named bankruptcy estate.

2. Before the Bankruptcy Case was commenced, Jones and Westbrook leased the following nonresidential real property to John C. Dorman and Wilma L. Dorman (the "Dormans"):

> The South Half of the Northeast Quarter of Section 22; the Southwest Quarter of Section 15; the south Half of Section 16; the Southeast Quarter of Section 17; the South Half of Section 16; the Southeast Quarter of Section 17; the South Half of Section 19; the Northwest Quarter of Section 211; the Southeast Quarter of Section 21; the North Half of the Southwest Quarter of Section 21; the North Half of the Southwest Quarter of Section 21, all in Township 5, Range 22, Beaver County Oklahoma.

3. Before the Bankruptcy Case was commenced, Jones leased certain additional nonresidential real property to the Dormans (the "Pasture Lease"). The

property leased to the Dormans under the Agricultural Lease and the Pasture Lease is collectively referred to herein as the "Leased Property".

4. On February 24, 1993, an order was entered in the Bankruptcy Case that decreed the Agricultural Lease to have been rejected under 11 U.S.C. Section 365 and that ordered Trustee to immediately surrender the property under the Agricultural Lease to Jones and Westbrook.

5. A wheat crop is now growing on the property formerly under the Agricultural Lease (the "Wheat Crop").

6. Jones and Westbrook have made certain claims in the Bankruptcy Case concerning matters arising from or relating to Agricultural Lease, the Pasture Lease, the Leased Property, and the Wheat Crop.

7. Trustee has informally made certain claims concerning the wheat crop and certain claims with respect to the rebate of cash rent paid to Jones on the Pasture Lease.

8. The parties each deny the validity of the other's claims.

9. In contemplation of the costs of litigation and the merits of their respective cases, and mindful of the goal of efficient administration of the estate, the parties desire to compromise, settle, and resolve all disputes, claims, actions, suits, demands, causes of action, and liabilities between them that arise from or related in any way to the Agricultural Lease, the Pasture Lease, the Wheat Crop, or the leased property.

10. The following is a summary of the terms of the settlement agreement:

- The Trustee shall have the right to harvest the Wheat Crop.

- Lessors shall receive 50% of the wheat crop growing upon the irrigated agricultural and 33% of the wheat crop growing upon the dry agricultural land as crop rent.

- Lessees shall receive 50% of the wheat crop growing upon the irrigated agricultural land and 66% of the wheat crop growing upon the dry agricultural land.

- ASCS payments attributable to the crop shall be divided between the parties in the same manner as the Wheat crop.

- Lessors' portion of the wheat crop and ASCS payments are not property of the bankruptcy estate and are not subject to the cost of administration. Lessee's portion of the wheat crop and ASCS payments are property of the bankruptcy estate pursuant to 11 U.S.C. Section 541.

- The estate shall bear the cost of harvesting, including delivering lessors' portion of the crop to the nearest commercial elevator.

- All leased land shall be surrendered effective April 2, 1993. The surrender of the land does not effect Trustee's right to harvest the wheat crop.

- The compromise agreement releases Jones, Westbrook, and the Dorman bankruptcy estate of all claims, of any nature, arising prior to the settlement agreement.

- The lessees' share of the wheat crop growing upon the agricultural land and the lessees' share of ASCS payments attributable to said crop are property of the bankruptcy estate pursuant to 11 U.S.C. Section 541.

11. The complete compromise agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

12. The Trustee respectfully submits that pursuant to Fed. R. Bankr. P 2002(a), an objection period of twenty (20) days after the date of filing of this Application is sufficient, and that an Order Compromising Controversy and Approving Compromise Agreement shall be entered herein and the allegations contained herein deemed confessed, unless a hearing is requested and a formal objection is filed in this proceeding the Clerk's Office of the United States Bankruptcy Court, and a copy is delivered to the undersigned counsel for the Trustee.

WHEREFORE, the Trustee respectfully requests that the Court enter an Order Compromising Controversy and Approving Settlement and Release Agreement, and for such other relief at law or in equity as may be just.

/s/ Karla J. Finnell
Karla J. Finnell
4000 N. Classen Blvd.
Suite 103N
Oklahoma City, OK 73118
(405) 528-0713
Attorney for Trustee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was mailed via first class mail, postage prepaid to all persons whose names appear upon the matrix herein and to all persons who have entered an appearance herein on April 23, 1993.

/s/ Karla J. Finnell
Karla J. Finnell

COMPROMISE AGREEMENT

This Compromise Agreement (the "Agreement") is entered into on April , 1993, by and between Pauline Jones ("Jones"), Ann Ell Westbrook ("Westbrook"), and Jack Cornelius, in and only in his capacity as trustee in the joint chapter 11 bankruptcy case styled: *In re: John C. Dorman and Wilma L. Dorman*, Case No. BK-92-16654-LN, United States Bankruptcy Court for the Western District of Oklahoma ("Trustee").

RECITALS

A. Trustee is the duly appointed, qualified, and acting trustee in the bankruptcy case styled: *In re: John C. Dorman and Wilma L. Dorman*, Case No. BK-92-16654-LN, in United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Case").

B. Before the Bankruptcy Case was commenced, Jones and Westbrook leased the following nonresidential real property to John C. Dorman and Wilma L. Dorman (the "Dormans"):

> The South Half of the Northeast Quarter of Section 22; the Southwest Quarter of Section 15; the South Half of Section 16; the Southeast Quarter of Section 17; the South Half of Section 19; the Northwest Quarter of Section 21; the Southeast Quarter of Section 21; the North Half of the Southwest Quarter of Section 21, all in Township 5, Range 22, Beaver County, Oklahoma

(the "Agricultural Lease").

C. Before the Bankruptcy Case was commenced, Jones leased certain additional nonresidential real property to the Dormans (the "Pasture Lease"). The property leased to the Dormans under the Agricultural Lease and the Pasture Lease is collectively referred to herein as the "Leased Property".

D. On February 24, 1993, an order was entered in the Bankruptcy Case that decreed the Agricultural Lease to have been rejected under 11 U.S.C. § 365 and that ordered Trustee to immediately surrender the property under the Agricultural Lease to Jones and Westbrook.

E. A wheat crop is now growing on the property formerly under the Agricultural Lease (the "Wheat Crop").

F. Jones and Westbrook have made certain claims in the Bankruptcy Case concerning matters arising from or relating to the Agricultural Lease, the Pasture Lease, the Leased Property, and the Wheat Crop.

G. Trustee has informally made certain claims concerning the Wheat Crop and certain claims with respect to the rebate of cash rent paid to Jones on the Pasture Lease.

H. The parties each deny the validity of the other's claims.

I. The parties desire to compromise, settle, and resolve all disputes, claims, actions, suits, demands, causes of action, and liabilities between them that arise from or relate in any way to the Agricultural Lease, the Pasture Lease, the Wheat Crop, or the Leased Property.

NOW THEREFORE for good and valuable consideration, the receipt, adequacy, and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. *The Wheat Crop.* Trustee shall have the right to harvest the Wheat Crop so long as harvesting it would be consistent with reasonably prudent farming practices. As soon as harvesting the Wheat Crop would no longer be consistent with reasonably prudent farming

practices, Trustee' interest therein shall be deemed to have been relinquished to Jones and Westbrook and Trustee shall no longer have any interest therein.

Should a dispute arise between Trustee and Jones and Westbrook about whether harvesting the Wheat Crop would no longer be consistent with reasonably prudent farming practices, the parties agree to submit that dispute to the bankruptcy court for an expedited resolution. In no event shall Trustee graze cattle on the Wheat Crop or any stubble remaining after the harvest thereof.

2. *Post Petition Rent and Harvest Expenses.* In full satisfaction of their claim for post petition rent on the property formerly under the Agricultural Lease, Jones and Westbrook shall receive fifty percent (50%) of the Wheat Crop harvested from the irrigated portion thereof and thirty-three and one-third percent (33 1/3%) of the Wheat Crop harvested from the unirrigated portion thereof. For purposes of this Agreement, ASCS payments shall be divided between the parties in the same manner as the Wheat Crop. The crop rent payable hereunder to Jones and Westbrook shall not be considered as property of the Dormans' bankruptcy estates and shall not bear any costs of administration in the Bankruptcy Case. The estate of John C. Dorman and Wilma L. Dorman shall bear all harvest related expenses and shall deliver the harvested Wheat Crop to the nearest commercial elevator free of any expense to Jones and Westbrook.

3. *Surrender of Leased Property.* All Leased Property, whether belonging to Jones, Westbrook, or other members of their families (excluding Mary Nassaman and Carol L. Yates), shall be deemed to have been surrendered effective April 2, 1993. Trustee shall reasonably cooperate with Jones and Westbrook in their efforts to immediately retake possession and relet the

Leased Property. The surrender of the Leased Property shall not effect Trustee' right, as set forth herein, to harvest the Wheat Crop.

4. *Release of Jones and Westbrook.* Trustee, as the representative of the Dormans' bankruptcy estates, hereby forever releases, discharges and acquits Jones and Westbrook, collectively and individually, from any and all manner of actions and causes of action, whether at law or in equity, including all known or potential suits, debts, liens, contracts, agreements, promises, liabilities, claims, demands, damages, losses, costs, and expenses, of every kind and nature, whether known or unknown, suspected or unsuspected, or fixed or contingent, which Trustee now has, or may have, by reason of any matter, cause, or thing arising from or in any way relating to, the Agricultural Lease, the Pasture Lease, or the Leased Property; provided, however, this release shall not release claims arising under this Agreement.

Without limiting the scope of the foregoing release, Trustee hereby specifically releases and forever discharges any and all claims he may hold under the Agricultural Lease and the Pasture Lease, except the claim to the Wheat Crop that is set forth under paragraph 1 hereof.

This release shall not become effective or enforceable until this Agreement has been approved by the bankruptcy court, as provided in paragraph 8.

5. *Release of the Dormans' Bankruptcy Estates.* Jones and Westbrook, collectively and individually, hereby forever release, discharge, and acquit the Dormans' bankruptcy estates from any and all manner of actions and causes of action, whether at law or in equity, including, but not limited to, all known or potential suits, debts, liens, contracts, agreements, promises, liabilities, claims, demands, damages, losses, costs, and expenses, of every kind and nature, whether

known or unknown, suspected or unsuspected, or fixed or contingent, which Jones and Westbrook now have, or may have, by reason of any matter, cause, or thing arising from or in any way relating to the Agricultural Lease, the Pasture Lease, or the Leased Property; provided, however, this release shall not release claims arising under this Agreement and shall not release any claims accruing after the date hereof.

This release shall not become effective or enforceable until this Agreement has been approved in its entirety by the bankruptcy court, as provided in paragraph 8.

6. *Other Claims.* This Agreement is intended to pertain only to claims arising from or relating to the Agricultural Lease, the Pasture Lease, the Wheat Crop, and the Leased Property. Accordingly, this Agreement shall not effect other claims Jones and Westbrook, collectively, or Jones, individually, may hold against the Dormans, as individuals. It is specifically agreed that claims against the Dormans, as individuals, do not constitute claims against the bankruptcy estate. Further, it is specifically agreed that this Agreement shall not effect the purchase agreement entered into on the 1st day of August, 1992 between Jones and the Dormans.

7. *Insurance.* This Agreement shall not bar or limit Jones and Westbrook from presenting claims under Federal Crop Insurance on the Wheat Crop.

8. *Bankruptcy Court Approval.* The compromise of controversy set forth in this Agreement is expressly conditioned upon, and subject to, approval by the bankruptcy court presiding over the Dormans' Bankruptcy Case. Such approval shall include bankruptcy court findings that the Leased Property, Wheat Crop, and ASCS payments referred to above are not property of the Dormans separate and apart from their bankruptcy estates. If this Agreement is not approved

in its entirety by the bankruptcy court, this Agreement shall be null and void and of no further force or effect. Upon the parties execution of this Agreement, Trustee shall take the actions necessary to obtain bankruptcy court approval of this Agreement. The parties shall use their best efforts to obtain such approval.

9. *Appeal.* Should any appeal be taken from the bankruptcy court order approving this Agreement, Trustee shall defend the appeal as necessary and appropriate and bear his costs and expenses in connection with such defense.

10. *No Admission of Liability.* This Agreement resolves disputed claims between the parties and is being made to avoid the substantial costs, expenses, and uncertainties associated with a judicial resolution of such claims. Neither the execution nor performance of any of the terms of this Agreement shall constitute or be construed as an admission of any liability or any fact.

11. *Waiver.* No breach of any provision hereof can be waived unless done in writing. Waiver of any one breach shall not be deemed a waiver of any other breach or any other provision hereof. This Agreement may be amended only by a written agreement executed by all parties.

12. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one agreement.

13. *Entire Agreement.* No promises, inducements, or representations not expressly set forth herein have been made to any of the parties or any of their representatives. This Agreement constitutes the final and entire agreement between the parties. This Agreement shall supersede all prior negotiations and agreements, whether written or oral, that pertained in any

way to the subject matter hereof. The terms of this Agreement are contractual in nature and not mere recitals.

14. *Choice of Law.* This Agreement shall be construed under, and interpreted in accordance with, the laws of the State of Oklahoma.

15. *Use of Headings.* All headings in this Agreement are used solely for the convenience of the parties and are not to be interpreted as part of this Agreement.

16. *Successors.* This Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the parties and their respective successors, administrators, trustees, and assigns.

17. *Authority.* The parties declare, warrant, and represent that they have agreed to the terms of this Agreement and that they have all requisite authority to enter into this Agreement.

18. *Binding Effect.* The terms of this Agreement shall be binding upon all parties in interest to the Bankruptcy Case.

19. *Time.* Time is of the essence under this Agreement.

20. *Pre-Settlement Costs & Fees.* The parties shall bear their own costs and attorney's fees through the date of this Agreement.

21. *Further Documents.* The parties agree to execute such other and further instruments as may be reasonably necessary to carry into effect the intent of this Agreement.

22. *Modifications.* No modifications to this Agreement shall be effective unless made in a signed writing.

23. *No Admission.* Nothing contained herein shall be construed as an admission of liability by any party

hereto, such liability being expressly denied by each and every party to this Agreement.

Executed the day, month and year first written above.

/s/ Jack Cornelius
JACK CORNELIUS, as trustee of the bankruptcy estates of John C. Dorman and Wilma L. Dorman

PAULINE JONES

ANN ELL WESTBROOK

518.01/A1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JOHN C. DORMAN	)	Case No. 92-16654 LN
d/b/a DORMAN FARMS	)	Chapter 11
and	)	Filed March 25, 1993
WILMA DORMAN,	)	

Debtors.

AMENDED MAILING MATRIX

Jack Cornelius, trustee of this Chapter 11 case submits the attached amendment to the mailing matrix to include the creditors of Lonetree, Inc.

/s/ John R. Hughey
John R. Hughey, OBA #4470
HASWELL JONES HUGHEY
VAUGHN & THOMAS
2800 Liberty Tower
100 N. Broadway
Oklahoma City, OK 73102
(405) 235-7511
ATTORNEYS FOR JACK
CORNELIUS, TRUSTEE

CETIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amendment to Mailing Matrix and the attachment thereto was mailed, via first class mail, postage prepaid to all persons on the mailing matrix herein and to all persons who have entered an appearance in this case on the 25th of March, 1993.

/s/ John R. Hughey
John R. Hughey

AMENDED MATRIX

John C. and Wilma Dorman
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Forgan, OK 73938

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Roy E. Lyles
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Wichita, KS 67201